Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11533 Jeremy Wiesen also known as Jeremy Weisen, Index 654956/16
Plaintiff-Appellant,

-against-

Verizon Communications, Inc.,
Defendant-Respondent.

_____

Heerde Blum LLP, New York (Collin J. Cox of counsel), for appellant.

Spears & Imes LLP, New York (Linda Imes and Reed M. Keefe of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered on or about October 1, 2018, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Verizon Communications Inc. (Verizon) to dismiss plaintiff's claim for tortious interference with contract, unanimously affirmed, without costs.

To support a tortious interference claim, New York law requires that the contract would not have been breached "but for" the defendant's conduct (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]; *CDR Creances S.A. v Euro-American Lodging Corp.*, 40 AD3d 421, 422 [1st Dept 2007]). Here, the complaint contains no specific allegations to this effect.

Furthermore, it follows that if the alleged underlying breach occurs before the claimed "inducement" by a defendant, the inducement "could not have been the 'but for' cause of [the]

purported breaches" (*North Star Contr Corp. v MTA Capital Constr. Co.*, 120 AD3d 1066, 1071 [1st Dept 2014]; *Cantor Fitzgerald Assoc. v Tradition N. Am.*, 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]). Plaintiff makes only conclusory allegations in an effort to establish that Verizon knew about the underlying agreements before nonparty Ram Telecom International, Inc. is alleged to have breached them.

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11534 In re Donavan V., Dkt. D-00678/19

A Person Alleged to be a
Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Susan Clement of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Claibourne Henry of counsel), for presentment agency.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about March 26, 2019, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him on probation for a period of nine months, unanimously affirmed, without costs.

The court providently exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation. This was the least restrictive dispositional alternative consistent with appellant's best interests and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947, 948 [1984]). In light of the fact that the underlying incident was a violent robbery involving injury to the victim and

appellant's unfavorable disciplinary and academic records at school, the court was justified in finding that an adjournment in contemplation of dismissal would not have provided adequate supervision.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11535 Prospect Funding Holdings, LLC, Index 652396/16
Plaintiff-Appellant,

-against-

Shannon Paiz,
Defendant,

Jon L. Norinsberg, Esq., et al.,
Defendants-Respondents.

_____

Hegge & Confusione, LLC, New York (Michael Confusione of counsel), for appellant.

Law Offices of Jon L. Norinsberg, New York (Chaya M. Gourarie of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about May 21, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its claims against defendants Jon L. Norinsberg, Esq. (Norinsberg), Jon Norinsberg Esq., PLLC and the Law Offices of Jon L. Norinsberg, Esq. (collectively, Norinsberg Defendants) for breach of contract, promissory estoppel, conversion, and breach of fiduciary duty, and sua sponte granted the Norinsberg Defendants summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The breach of contract claim was correctly dismissed because the relevant documents do not identify the Norinsberg Defendants as parties and do not impose upon them any obligations to plaintiff. The parties identified in those documents are plaintiff, as "Seller," and defendant Paiz, as "Purchaser." The

Purchase Agreement is signed by Paiz and plaintiff's representative, not by the Norinsberg Defendants. The liquidated damages provision of the Purchase Agreement defines plaintiff's remedies against Paiz (seller) upon seller's defaults. The annexed "Important Information" is signed by Paiz only. In his capacity as Paiz's attorney, Norinsberg signed a "Certification" below Paiz's signature on the Important Information document, stating that he discussed the terms and conditions of the Purchase Agreement with Paiz, that he has a contingency fee agreement with her, that all proceeds of the suit in which he is representing her will be disbursed via the attorney's trust account, and that he is following Paiz's written instructions with regard to the Purchase Agreement. Those written instructions are contained in the "Irrevocable Letter of Direction," in which Paiz instructs Norinsberg "NOT to release any funds to me until [any dispute with plaintiff] is resolved." Norinsberg also signed an "Attorney Acknowledgment" at the end of the Irrevocable Letter of Direction, acknowledging receipt of the letter from his client and reiterating his agreement to follow his client's direction, and stating that plaintiff "has relied" on the Irrevocable Letter of Direction and the Attorney Acknowledgment.

Similarly, the promissory estoppel claim was correctly dismissed because plaintiff cannot identify a "clear and unambiguous promise" made to it by the Norinsberg Defendants (*see*

Underhill Holdings, LLC v Travelsuite, Inc., 137 AD3d 533, 534 [1st Dept 2016]). As indicated, to the extent the Norinsberg Defendants made a promise concerning disbursement of settlement proceeds, the promise was made to Paiz.

The conversion claim was correctly dismissed because it is predicated on breach of the Purchase Agreement and alleges no independent facts sufficient to give rise to tort liability (*see Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]).

The fiduciary duty claim was correctly dismissed because there was no fiduciary relationship between plaintiff and the Norinsberg Defendants (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Plaintiff failed to demonstrate that, by virtue of the Purchase Agreement or otherwise, it had a relationship with the Norinsberg Defendants grounded in a "higher level of trust than normally present in the marketplace," which imposed on the Norinsberg Defendants "a duty to act for or to give advice for [its] benefit" (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

In view of the foregoing, the court properly granted summary judgment to the Norinsberg Defendants dismissing the action (CPLR 3212[b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11537 The People of the State of New York, Ind. 3680/10
Respondent,

-against-

Henry Gaston,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Alexander L. Mitter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Ruth Pickholz, J.), rendered December 18, 2018, resentencing defendant to concurrent terms of one to three years on his convictions of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, unanimously affirmed.

Defendant does not challenge his resentencing on the grand larceny and possession of stolen property counts, which corrected an undisputed illegality in the original sentences, but instead asserts that the resentencing court improperly denied his CPL 440.20 motion insofar as he had sought a plenary resentencing, which would include his convictions of rape and other violent felonies under four other counts.

Defendant claims that the original sentencing court (Bruce Allen, J.), which imposed sentences on the larceny and stolen property counts that would only have been lawful for a second felony offender, must have believed that defendant actually was

such an offender, and that this mistaken belief affected the court's exercise of discretion when it imposed sentence on the other four counts. The record refutes this claim. The prosecutor and defense counsel agreed that defendant was not a predicate felon, the statement required to impose such a sentence was not filed, and the required proceeding was not held. Although the court was mistaken about the scope of sentencing for the larceny and stolen property counts, it was not mistaken about defendant's status.

Accordingly, there was nothing unlawful about defendant's sentences on the four violent felony convictions. Defendant's resentencing was solely for the purpose of correcting the illegal sentences imposed on the other two convictions, and was not a plenary resentencing requiring the exercise of sentencing discretion. Therefore, we may not reduce his sentences on the four counts at issue in the interest of justice (*see People v Lingle*, 16 NY3d 621, 634-635 [2011]). As we held on defendant's direct appeal (*People v Gaston*, 146 AD3d 412 [1st Dept 2017], *lv denied* 29 NY3d 948 [2017]), we perceive no basis for reducing the

sentence.

We have considered the remaining contentions raised in defendant's pro se brief and find them to be without merit.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11538 Marsha Bateman, Index 309690/11
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

_____

Umoh Law Firm, PLLC, Brooklyn (Uwem Umoh of counsel), for appellant.

Littler Mendelson P.C., New York (Jean L. Schmidt of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 30, 2018, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's claims for employment discrimination, hostile work environment, and retaliation under the New York State and City Human Rights Laws (State and City HRLs), unanimously modified, on the law, to deny the motion to the extent it sought dismissal of plaintiff's claims for race-based employment discrimination, hostile work environment and retaliation in violation of the State and City HRLs, and otherwise affirmed, without costs.

There is no dispute that plaintiff met the first three elements, under both statutes, for a prima facie claim of employment discrimination, in that she was a black woman, was qualified for her position, and was subjected to an adverse employment action by being terminated. She also showed that she

met the alternative element, under the City Human Rights Law, of showing that she was disadvantaged. The dispute turns on whether defendants terminated plaintiff for discriminatory reasons (*see Harrington v City of New York*, 157 AD3d 582, 584 [1st Dept 2018]).

Plaintiff points to evidence that Dr. Reznik regularly favored white employees over black employees, by giving white employees better assignments while giving black employees undesirable assignments supposedly more consistent with their ethnicity. Plaintiff also alleges that Dr. Reznik regularly referred to black employees, collectively, in a critical manner clear from context, as "you people" or "those people." Plaintiff also testified that she heard Dr. Reznik mutter, in a critical manner, "black people," when chastising plaintiff. This evidence raises issues of fact as to whether defendants terminated plaintiff for invidious reasons.

Defendants responded by proffering a facially legitimate reason for terminating plaintiff, namely, that she failed in many, if not most, of her job requirements, and failed to improve after being given a warning and final chance (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]). Viewed as a whole, however, we find that issues of fact exist as to whether the proffered reason was pretextual (*cf. Uwoghiren v City of New York*, 148 AD3d 457, 458 [1st Dept 2017]), and thus, defendants' motion should be denied

to the extent it seeks dismissal of plaintiff's claims for race-based employment discrimination.

The court, however, properly dismissed plaintiff's claims for national origin-based employment discrimination, since those claims are without evidentiary support in the record. There are also issues of fact as to whether plaintiff was disparaged and treated unfairly for months, including being repeatedly subjected to remarks, thinly-veiled and on one occasion express, which slighted black people as a group. This evidence, if credited, supports a hostile work environment claim under the State and City HRLs (*see Hernandez v Kaisman*, 103 AD3d 106, 114-115 [1st Dept 2012]).

In support of her retaliation claims, plaintiff points to evidence that, on September 21, 2010, she complained that defendants were discriminating against her on account of her race. Some days later, plaintiff elaborated on this complaint in a lengthy interview with one of Montefiore's Human Resources (HR) professionals. Defendants responded to plaintiff's complaint by terminating her on October 5, 2010. This close temporal relationship between plaintiff's complaints and her termination is, by itself, enough to support a finding of a causal connection between them (*see Harrington*, 157 AD3d at 586; *Krebaum v Capital One, N.A.*, 138 AD3d 528, 528-529 [1st Dept 2016]). Furthermore, during the interview, the HR officer strongly suggested that plaintiff would be punished for speaking out, which further

supports a finding of causal connection between plaintiff's complaints and her termination. Accordingly, triable issues of fact exist as to whether defendants terminated plaintiff in retaliation for her complaints about racial discrimination.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11539 Maria E. Ruiz, Index 24582/13E
Plaintiff-Respondent,

-against-

Riaz Rahman, M.D., et al.,
Defendants-Appellants,

Maya Aponte, M.D., et al.,
Defendants.

_____

KL Rotondo & Associates Rye (Kathi Libby Rotondo of counsel), for Riaz Rahman, M.D., appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for Bronx East Urgent Care Center and Montefiore Medical Center, appellants.

Krentsel & Guzman, LLP, New York (Marcia K. Raicus of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 2, 2019, which denied the motions of Riaz Rahman, M.D., Bronx East Urgent Care Center and Montefiore Medical Center for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting detailed expert affidavits averring that Dr. Rahman's treatment of plaintiff did not deviate from good and accepted medical practice (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Ramirez v Cruz*, 92 AD3d 533 [1st Dept 2012]).

In response, plaintiff failed to raise a triable issue of

fact, as the affidavit from his expert set forth only general conclusions, misstatements of evidence and unsupported assertions which were insufficient to demonstrate that Dr. Rahman's treatment of plaintiff failed to comport with accepted medical practice, or that such failure was proximate cause of plaintiff's injuries (*Ramirez* at 533; *Dasent v Schechter*, 95 AD3d 693 [1st Dept 2012]; *Coronel v New York City Health & Hosp. Corp.*, 47 AD3d 456 [1st Dept 2008]). Indeed, while the expert averred that Dr. Rahman showed "little to zero concern that plaintiff was developing endocarditis," the records reflect that Dr. Rahman considered various infections in his differential diagnosis, and ordered, inter alia, blood cultures, chest X-rays and an echocardiogram, the very tests leading to plaintiff's diagnosis of endocarditis. Moreover, plaintiff's expert failed to address that the delay in obtaining blood cultures was in part due to plaintiff's own failure to appear for a blood draw until twelve days after defendant doctor ordered it. Plaintiff's expert also failed to address the opinion of defendant's expert, an infectious disease specialist, that plaintiff's valve damage was

not due to the infection at issue, but by a second infection, by a different bacteria, as evidenced by her medical records (*see Abalola v Flower Hosp.*, 44 AD3d 522, 522 [1st Dept 2007]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11540-
11540A PH-105 Realty Corp, et al.,
Plaintiffs-Appellants,

-against-

Munzer Elayaan, et al.,
Defendants-Respondents.

Index 656160/16

_____

The Aboushi Law Firm, New York (Aymen A. Aboushi of counsel), for appellants.

McKool Smith, New York (James H. Smith of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Gerald Lebovits, J.), entered May 14, 2019, dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, and defendants' motion for summary judgment dismissing the declaratory judgment and unjust enrichment claims alleging an ownership interest in plaintiff 181 Edgewater LLC (Edgewater) denied. Appeal from order, same court and Justice, entered on or about April 19, 2019, to the extent it denied plaintiffs' motion for summary judgment and granted defendants' motion for summary judgment dismissing the aforesaid claims, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court improvidently exercised its discretion in failing to apply the doctrine of "tax estoppel." Under that doctrine, defendants' acts in filing corporate tax returns for the years 2010 through 2014, signed by defendant Elayan, which contained factual statements that plaintiff Jaber had a 75% ownership

interest in Edgewater during that time period, and precludes defendants from taking a position contrary to that in this litigation (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *Livathinos v Vaughan*, 121 AD3d 485 [1st Dept 2014]; *see also Man Choi Chiu v Chiu*, 125 AD3d 824 [2d Dept 2015], *lv denied* 26 NY3d 905 [2015]). To the extent our decision in *Matter of Bhanji v Baluch* (99 AD3d 587 [1st Dept 2012]) has been interpreted as making the doctrine generally inapplicable with respect to factual statements of ownership in tax returns, we clarify that the doctrine applies where, as here, the party seeking to contradict the factual statements as to ownership in the tax returns signed the tax returns, and has failed to assert any basis for not crediting the statements (*see Cusimano v Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 118 AD3d 542 [1st Dept 2014]; *Stevenson-Misischia v L'Isola D'Oro SRL*, 85 AD3d 551 [1st Dept 2011]; *see also Matter of Elmezzi*, 124 AD3d 886, 887 [2d Dept 2015]).

Although defendants are estopped to deny Jaber's 75% ownership interest in Edgewater between 2010 and 2014, it does not follow that plaintiffs are entitled to summary judgment on their claim for a declaration that Jaber remains the 75% owner of Edgewater, or on their alternative unjust enrichment claim alleging an unlawful deprivation of that ownership right. Issues of fact remain as to who presently owns Edgewater and whether defendant Elayan unlawfully stripped Jaber of his ownership

rights. Nor are defendants, in light of the established fact of Jaber's 2010-2014 ownership interest, entitled to summary judgment dismissing plaintiff's claims based on the other record evidence as to the ownership of Edgewater.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11541 D&R Global Selections, S.L., Index 603732/07
Plaintiff-Respondent,

-against-

Bodega Olegario Falcon Pineiro,
Defendant-Appellant.

_____

Gleason & Koatz, LLP, New York (Byron A. Quintanilla of counsel), for appellant.

Zara Law Offices, New York (Robert M. Zara of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 17, 2018, which, to the extent appealed from as limited by the briefs, denied defendant's motion to dismiss the action on the ground of forum non conveniens, unanimously affirmed, with costs.

The movant seeking dismissal on the grounds of forum non conveniens has a "heavy burden" of establishing that New York is an inconvenient forum, and that a substantial nexus between New York and the action is lacking (*Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599, 600 [1st Dept 2008]). Here, the record demonstrates that defendant failed to establish that the balance of the forum non conveniens factors point

strongly in its favor (*see Swaney v Academy Bus Tours of N.Y., Inc.*, 158 AD3d 437, 438 [1st Dept 2018]; *see generally Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11542 In re Maria K., v-00183-13/18H
Petitioner-Appellant, V-00184-13/18h
V-34266-11/18J
-against- V34267-11/18J

Dimitra L., et al.,
Respondents-Respondents.

Carol L. Kahn, New York, for appellant.

Leslie L. Lowenstein, Woodmere, for Dimitra L., respondent.

Douglas H. Reiniger, New York, for Christopher B., respondent.

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), attorney for the child Kristyna B. (Zak B.).

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), attorney for the child Matthew B.

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about January 7, 2019, which granted respondent father's motion to dismiss the amended petition to modify the parties' custody order, unanimously affirmed, without costs.

In June 2014, a final custody and visitation order was issued on consent of all parties, awarding joint legal custody of the children to petitioner mother and respondent great-grandmother, with primary physical custody to the great-grandmother and visitation to the parents. Upon the mother's petition, and after a hearing, in February 2018, the court modified the 2014 order to grant final decision-making authority to the great-grandmother in the event of a dispute with the mother. We affirmed in June 2019 (*Matter of Maria K. v*

Dimitra L., 173 AD3d 567 [1st Dept 2019]).

While her appeal from the February 2018 custody order was pending, in August of 2018, the mother brought a petition to modify the 2018 order. The court properly dismissed the petition on the ground that the mother failed to make a sufficient evidentiary showing of a change in circumstances to warrant a hearing (*see e.g. Matter of Brandy P. v Pauline W.*, 169 AD3d 577 [1st Dept 2019]; *and see Friederwitzer v Friederwitzer*, 55 NY2d 89 [1982]).

The mother did not preserve for appellate review her contentions that the court and the attorney for one of the children failed to consider that child's mental health records and that she could not adequately plead the child's mental health problems without obtaining the child's mental health records. Her conclusory allegations about the child's deteriorating mental health are insufficient to warrant review in the interest of justice. The mother also failed to show that she is better equipped than the great-grandmother to address the child's mental health issues.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11543 The People of the State of New York, Respondent, Ind. 362N/13 4232N/13

-against-

Amir Shabazz, Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Rachel Bond of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at first plea; Michael J. Obus, J., at second plea and sentencing), convicting defendant of attempted assault in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of five years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for a youthful offender determination, and otherwise affirmed.

As the People concede, based on *People v Rudolph* (21 NY3d 497 [2013]), defendant is entitled to resentencing for an express

youthful offender determination.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11544 Antoine Jackson, Index 20776/14E
Plaintiff-Respondent,

-against-

Savoy Park Owner LLC, et al.,
Defendants,

AFP Forty One Corp., et al.,
Defendants-Appellants.

_____

Gannon Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants.

Edelman Krasin & Jaye, PLLC, Westbury (Aaron D. Fine of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered September 24, 2019, which denied the motion of defendants AFP Forty One Corp., AFP Thirty Eight Corp. and AFP Thirty Seven Corp. (collectively AFP defendants) for, inter alia, summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when, while descending exterior steps at the back entrance of a building in the Savoy Park complex, he slipped and fell down the stairs. In support of their motion for summary judgment, AFP defendants submitted evidence, including the pleadings, a lease and deposition testimony, demonstrating that the Savoy Park defendants owned and managed the building, that two of the AFP defendants had no connection with the property, and that one of them had a land lease interest.

Inasmuch as plaintiff presented no evidence to dispute AFP defendants' showing that they did not have or had completely parted with any possession or control of the premises, AFP defendants were entitled to summary judgment dismissing the complaint as against them since they did not breach any duty to maintain the premises (*see Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142-145 [2019]; *compare Worth Distribs. v Latham*, 59 NY2d 231, 238 [1983]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11545 T.H., etc., Index 350307/11
Plaintiff-Appellant,

-against-

New York City Health & Hospital Corporation (North Central Bronx Hospital),
Defendant-Respondent.

_____

The Fitzgerald Law Firm, P.C., Yonkers (John M. Daly of counsel), for appellant.

Georgia M. Pestana, Acting Corporation Counsel, New York (Julie Steiner of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about January 10, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was born via emergency cesarean section after a prolonged diminution of the fetal heartbeat indicative of bradycardia. Defendant does not contest that plaintiff suffered a perinatal hypoxic ischemic insult, with an acidotic pH level in the umbilical cord at birth and a postnatal indication of seizure activity within the first few hours of life.

Defendant failed to establish prima facie that its staff did not depart from good and accepted medical practice, as it submitted competing expert opinions by obstetric practitioners in New York who reached opposing conclusions based on the same labor and delivery records (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Resolution of issues of credibility of

expert witnesses and the accuracy of their testimony are matters within the province of the jury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]).

Defendant established prima facie, via an expert opinion, that any departure was not a proximate cause of the infant plaintiff's conditions, including attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder, and speech, language, and cognitive delays. Defendant also submitted an expert opinion by a pediatric neurologist which had previously been provided by plaintiff, and argued that it was insufficient to demonstrate proximate cause. The motion court agreed, finding that the plaintiff's expert's opinion was not supported by the expert's cited articles, which merely discussed associations between such perinatal injury and ADHD (*see generally Parker v Mobil Oil Corp.*, 7 NY3d 434, 448 [2006]).

However, plaintiff raised an issue of fact as to causation by submitting an additional expert opinion by a pediatric neurologist in opposition to defendant's motion. That opinion offers a synthesis of numerous medical studies not cited by

plaintiff's previous expert, which reasonably permits the conclusion that the alleged departures proximately caused plaintiff's conditions (*see Marsh v Smyth*, 12 AD3d at 307, 308 [1st Dept 2004]; *accord Lugo v New York City Health & Hosps. Corp.*, 89 AD3d 42, 57-58 [2d Dept 2011]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11546 The People of the State of New York, Ind. 1859N/11
Respondent,

-against-

Tefsa Walters,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Angie Louie of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Aaron Zucker of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered July 17, 2012, as amended August 2, 2012, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fourth degrees, criminal use of drug paraphernalia in the second degree and criminal possession of marijuana in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of six years, unanimously affirmed.

The court properly admitted recordings of phone calls defendant made while in custody. Some of the calls at issue do not implicate uncharged crimes because they were directly relevant to crimes with which defendant was charged (*see People v* Frumusa, 29 NY3d 364, 370 [2017]). The other call at issue, in which defendant's friend informed him of drug sales that he and another person had made after defendant's arrest does implicate

uncharged crimes, but they were plainly relevant to whether defendant possessed the intent required to commit criminal possession of a controlled substance in the third degree (*see People v Ingram*, 71 NY2d 474 [1988]; *People v Robles*, 159 AD3d 479 [2018], *lv denied* 31 NY3d 1121 [2018]). As to all of the calls, we find that the court providently exercised its discretion in finding that their probative value outweighed any potential for prejudice, and, in any event, any error in admitting the evidence was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's constitutional arguments are unpreserved and we decline to review them in the interest of justice.

The court also providently exercised its discretion when it ruled that questions by defense counsel, during cross-examination of a detective who participated in the execution of the warrant that led to defendant's arrest, opened the door to the detective's testimony that there was evidence that drugs were being sold out of the apartment, and that a person fitting

defendant's description was one of the two targets (*see People v Massie*, 2 NY3d 179 [2004]). The carefully limited ruling properly responded to questioning that "might otherwise mislead the fact finder" (*id.* at 180), and the court provided suitable jury instructions.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11547 Carmen M. De Jesus, Index 304219/14
Plaintiff-Appellant,

-against-

Roban Corp., et al.,
Defendants-Respondents.

_____

Elefterakis, Elefterakis & Panek, New York (Oliver R. Tobias of counsel), for appellant.

Devitt Spellman Barrett, LLP, Smithtown (John M. Denby of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about March 20, 2019, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she slipped and fell on snow-covered ice on a sidewalk abutting property owned by defendant Roban Corp. and leased to defendant A&B Department Store Inc. Defendants submitted certified weather records and a meteorologist's affidavit showing that a winter storm was in progress at the time that plaintiff slipped and fell thereby suspending their duty to take reasonable measures to remedy dangerous conditions caused by the storm (*see Moreno v Trustees of Columbia Univ. in the City of N.Y.*, 161 AD3d 501 [1st Dept 2018]).

In opposition, plaintiff failed to raise a triable issue of

fact. Plaintiff's expert did not dispute that there was an ongoing storm at the time of plaintiff's fall (*see Levene v No. 2 W. 67th St., Inc.*, 126 AD3d 541, 542 [1st Dept 2015]), and plaintiff provided no evidence to support her theory that the ice she slipped on was old or preexisting (*see id.*). The opinion of plaintiff's expert that there was a residue of snow or ice from prior days was speculative and fails to raise an issue of fact (*see Dowden v Long Is. R.R.*, 305 AD2d 631, 632 [2d Dept 2003]). Furthermore, plaintiff's argument that defendants' efforts to remove the snow or ice on the date of the accident created or exacerbated the hazardous condition, is raised for the first time on appeal. In any event, plaintiff offers nothing other than speculation as to how defendants created or exacerbated the dangerous condition (*see Wexler v Ogden Cap Props., Inc.*, 154 AD3d 640, 641 [1st Dept 2017], *lv denied* 31 NY3d 909 [2018]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11548 In re Flag Container Services, Inc., Petitioner-Appellant, Index 155878/19

-against-

The Business Integrity Commission, etc., Respondent-Respondent.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

James E. Johnson, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered June 24, 2019, denying the petition to vacate respondent's determination, dated June 12, 2019, which denied petitioner's application for the renewal of its trade waste license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

In light of the totality of the conduct of petitioner and its related company, with which it shared principals, respondent's denial of petitioner's application to renew its trade waste license is rational and not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]; *see e.g. Matter of C.I. Contr. Corp. v New York Bus. Integrity Commn.*, 128 AD3d 450 [1st Dept 2015]). Respondent's stated reasons for the denial include the indictment of one of petitioner's principals, petitioner's history of safety

violations, which resulted in three fatalities at petitioner's work site and the work site of its related company, and petitioner's past submission of false and misleading information to respondent, i.e., failing to disclose that one of its principals continued to work for its related company without being identified on the latter's applications as a principal or an employee (*see* Administrative Code of City of NY § 16-509). Under the circumstances, respondent rationally declined to consider a lesser penalty.

Contrary to petitioner's contention, respondent provided the requisite notice and opportunity to be heard (Administrative Code § 16-509[a]), and was not required to hold a hearing (17 RCNY 2-08[a]; *Matter of Interstate Materials Corp. v City of New York*, 48 AD3d 464, 465 [2d Dept 2008]).

Petitioner failed to show that further discovery was likely to be "material and necessary to the prosecution or defense of this proceeding" (*Stapleton Studios v City of New York*, 7 AD3d 273, 274-275 [1st Dept 2004]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11549 The People of the State of New York, Ind. 2128N/17
Respondent,

-against-

Servisio Simmon,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (David Billingsley of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Curtis Farber, J.), rendered August 28, 2018,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Counsel for appellant is referred to
§ 606.5, Rules of the Appellate
Division, First Department.

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11550 The People of the State of New York, Ind. 3861/15
Respondent,

-against-

Anthony Baptiste,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Ronald Alfano of counsel), fr appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered October 4, 2016, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the seventh degree, and sentencing him to a term of eight months, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). The evidence not only permitted, but warranted the inference that defendant was aware

of the cocaine found in his own apartment (*see People v Watson*, 56 NY2d 632 [1982]; *People v Reisman*, 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11551 In re Sutton Associates, Index 158741/18
Petitioner-Appellant,

-against-

New York State Division of
Housing and Community Renewal,
Respondent-Respondent.

_____

Rosenberg & Estis, P.C., New York (Bradley S. Silverbush of counsel), for appellant.

Mark F. Palomino, New York (Dawn Ivy Schindleman of counsel), for respondent.

_____

Judgment (denominated an order), Supreme Court, New York County (Arthur D. Engoron, J.), entered June 17, 2019, denying the petition to annul a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated July 26, 2018, which, inter alia, denied petitioner's application for a rent increase based on the installation of major capital improvements (MCI) to its building, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's interpretation of Rent Stabilization Code (9 NYCRR) § 2522.4(a)(8) to mean that an owner must file an MCI rent increase application within two years of the physical completion of the MCI work, which includes completion of the contract work but not minor subsequent remedial measures, is not irrational or unreasonable, and we therefore defer to it (*see Matter of Metropolitan Life Ins. Co. v New York State Div. of Hous. &*

Community Renewal, 235 AD2d 354 [1st Dept 1997]; *see also Matter of MSK Realty Interests, LLC v Department of Fin. of the City of N.Y.*, 170 AD3d 459, 460 [1st Dept 2019], *appeal dismissed* 33 NY3d 1057 [2019]). The documents provided by petitioner in support of its MCI application and in response to DHCR inquiries provided a rational basis for DHCR to conclude that the MCI work had been completed in early 2013, more than two years prior to petitioner's submission of the MCI rent increase application (*see Matter of Hampton Mgt. v Division of Hous. & Community Renewal*, 255 AD2d 261 [1st Dept 1998] *lv denied* 93 NY2d 806 [1999]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11552 In re Deborah R., F-01967-01/17D
Petitioner-Respondent,

-against-

Dean E.H.,
Respondent-Appellant.

_____

Dean E.H., New York, appellant pro se.

Dobrish Michaels Gross LLP, New York (Robert S. Michaels of counsel), for respondent.

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Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about September 6, 2019, which denied respondent's objections to an order, same court (Cheryl Weir-Reeves, Support Magistrate), entered on or about July 12, 2019, which, after a hearing, granted petitioner's motion for attorneys' fees, unanimously affirmed, without costs.

The court correctly determined that nothing in the parties' stipulation prevented an award of attorneys' fees to petitioner, and acted within its discretion in awarding her $80,000 in such fees (*see* Family Court Act § 438[a]; *see also DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]). It expressly took into consideration the financial circumstances of the parties, the merits of the parties' positions, the nature and extent of the services rendered, the complexity of the issues involved, and the reasonableness of counsel's performance and fees under the circumstances. The record supports the court's conclusion that respondent's assets greatly exceeded those of petitioner and that

it was respondent who prolonged the litigation by disrupting the proceedings and being evasive about his finances. The record also amply supports the court's finding that respondent's testimony about his income and assets was incredible.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11553-
11554-
11555-
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Index 157627/19

Men Women N.Y. Model Management, Inc., et al.,
Plaintiffs-Appellants-Respondents,

-against-

Elite Model Management - New York LLC, et al.,
Defendants,

Sergio Leccese,
Defendant-Respondent,

Dana Cooper, et al.,
Defendants-Respondents-Appellants.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Alex Spiro of counsel), for appellants-respondents.

Davis & Gilbert LLP, New York (David Fisher of counsel), for Sergio Leccese, respondent.

Wrobel Markham LLP, New York (Daniel F. Markham of counsel), for Dana Cooper, Heather Hughes and Miguel Avalos, respondents.

Reppert Kelly & Vytell, LLC, New York (Christopher P. Kelly of counsel), for James Tinnelly, Jennifer Rubinetti Zafaranloo and Michael Bruno, respondents.

_____

Orders, Supreme Court, New York County (Melissa A. Crane, J.), entered on or about November 8, 2019, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for a preliminary injunction as against defendant Sergio Leccese, granted defendants Dana Cooper, Heather Hughes, and Miguel Avalos's and defendants James Tinnelly, Jennifer Rubinetti Zafaranloo, and Michael Bruno's (the Model Manager Defendants)

motions to vacate the preliminary injunction prohibiting them from soliciting plaintiffs' models or employees, and granted Leccese's motion to vacate the temporary restraining order, unanimously affirmed as to the Model Manager Defendants' and Leccese's motions, and appeal therefrom to the extent it denied plaintiffs' motion dismissed, without costs, as moot. Appeal from order, same court and Justice, entered August 26, 2019, which granted plaintiffs' motion for the aforesaid preliminary injunction against the Model Manager Defendants, unanimously dismissed, without costs, as abandoned.

Plaintiffs allege that their former employees, the Model Manager Defendants and defendant Leccese, resigned their employment as part of a conspiracy to steal talent (employees and models) from plaintiffs, in violation of the non-solicitation covenants in their employment agreements. Defendants seek to vacate certain provisional relief awarded to plaintiffs, on the ground that plaintiffs failed to timely commence arbitrations, as required by CPLR 7502(c).

CPLR 7502(c) authorizes courts to award provisional relief "in connection with an arbitration that is ... to be commenced" where "the award to which the applicant may be entitled may be rendered ineffectual without such ... relief." However, the applicant is required to commence arbitration within 30 days of receiving the provisional relief, or else "the order granting such relief shall expire and be null and void and costs,

including reasonable attorney's fees, awarded to the respondent" (*id.*).

CPLR 7502(c) applies to the instant dispute because the subject provisional relief was entered in aid of arbitration. There is no independent cause of action for injunctive relief (*see Talking Capital LLC v Omanoff*, 169 AD3d 423, 424 [1st Dept 2019]), and it is undisputed that plaintiffs' underlying breach of contract claim is subject to mandatory arbitration.

Although defendants' employment agreements also provide for provisional injunctive relief, the purpose of these provisions was not to create an independent right to such relief regardless of whether plaintiffs' underlying claims were ever actually arbitrated. Rather, the purpose of the injunctive relief clause here was to streamline the process of obtaining provisional relief in aid of arbitration by effectively conceding that the non-solicitation provisions were "reasonable and necessary" and that breach would result in "irreparable injury."

Plaintiffs failed to demonstrate good cause to extend the time in which to commence arbitrations. Even if substitution of counsel would constitute good cause under other circumstances, it does not constitute good cause here, where the substitution came after the subject deadline had already expired and defendants had already moved to vacate. Moreover, there is no evidence in the record, such as a sworn statement from prior counsel, to support plaintiffs' assertion that counsel believed that CPLR 7502(c) was

not applicable. Nor is it clear that such a belief would have been reasonable.

In view of plaintiffs' release of Leccese from his non-solicitation obligations, we dismiss as moot the portion of this appeal related to the preliminary injunction against Leccese.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Acosta, P.J., Renwick, Webber, Gesmer, JJ.

11557N Kamelia K. Poppe, Index 300953/19
Plaintiff-Appellant,

-against-

William F. Poppe,
Defendant-Respondent.

_____

Kamelia K. Poppe, appellant pro se.

Saltzman Chetkof & Rosenberg LLP, Garden City (Lee Rosenberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Frank P. Nervo, J.), entered March 13, 2019, which, to the extent appealed from as limited by the briefs, denied plaintiff mother's motion for a protective order directing that defendant father's parenting time with the children be supervised and to set a sum certain of child support arrears to be paid through the Support Collection Unit (SCU), and granted defendant's cross motion to the extent of reserving his right to seek counsel fees, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion to direct that defendant's visitation with the children be supervised, without a hearing, as plaintiff failed to make a showing that in light of changed circumstances it would not be in the children's best interests to adhere to the custody provisions of the parties' settlement agreement (*see Steck v Steck*, 307 AD2d 819, 820 [1st Dept 2003]; *Matter of Margaret M.W.S. v Richard A.M.*, 179 AD3d 528 [1st Dept 2020]). In

particular, as the court noted, plaintiff filed the instant motion as an emergency ex parte application after learning that defendant had commenced a proceeding in Nassau County, where he resides, to enforce the custody provisions of the parties' settlement agreement and to vacate its child support provisions.

In any event, defendant refuted plaintiff's allegations that his mental and physical impairments required that he be supervised during his parenting time with the children. He submitted a letter from his treating endocrinologist who stated that his type I diabetes was well managed and did not physically impair him or his ability to drive. He also submitted the United States Tax Court's Memorandum of Findings of Fact and Opinion in a case arising from a deficiency in his Federal income tax for the 2007 tax year, in which plaintiff, who represented him, raised as a defense that defendant suffers from ASD, previously known as Asperger's Syndrome, thereby demonstrating that she was well aware of his diagnosis before the parties executed their settlement agreement.

Under the circumstances, the court also acted within its discretion in declining to appoint an attorney for the children (*see Phillips v Phillips*, 146 AD3d 719, 720 [1st Dept 2017]) and obtain forensic evaluations (*see Matter of James Joseph M. v Rosanna R.*, 32 AD3d 725, 727 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]).

With respect to plaintiff's claim for child support arrears,

we find that the child support provisions set forth in the settlement agreement did not comply with the CSSA and are therefore invalid and unenforceable (*see e.g. David v Cruz*, 103 AD3d 494 [1st Dept 2013]).

Plaintiff did not include the issue of counsel fees in her notice of appeal, which limited the appeal to other issues, and therefore it is not properly before us.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10132 The People of the State of New York, Ind. 4498/15
Respondent,

-against-

Armando Hernandez,
Defendant-Appellant.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Jill Konviser, J.), rendered March 21, 2016,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated April 7, 2020,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 21, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10749 China Development Industrial Bank, Index 650957/10
Plaintiff-Appellant-Respondent,

-against-

Morgan Stanley & Co. Incorporated
(now known as Morgan Stanley & Co LLC), et al.,
Defendants-Respondents-Appellants,

TCW Asset Management Company, et al.,
Defendants.

_____

Robbins Geller Rudman & Down LLP, Melville (Jason C. Davis of counsel), for appellant-respondent.

Davis Polk & Wardwell LLP, New York (James P. Rouhandeh of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about December 27, 2018, as amended by order, same court (Charles E. Ramos, J.H.O.), entered on or about March 7, 2019, which, insofar as appealed from, denied the Morgan Stanley defendants' motion for summary judgment dismissing the complaint as against them, and granted their motion for spoliation sanctions to the extent of precluding plaintiff from introducing any emails or audio recordings in its or defendants' files to support its claims at trial, unanimously modified, on the law and the facts, to deny defendants' motion for spoliation sanctions in its entirety, and otherwise affirmed, without costs.

Spoliation sanctions are available regardless of whether evidence was destroyed intentionally, willfully or negligently (*Pegasus Aviation I, Inc. v Varig Logistica S.A*, 26 NY3d 543

[2015]). We see no basis for spoliation sanctions on this record. A party who seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it when it was destroyed, the evidence was destroyed with a "culpable state of mind," and "the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*id. at 547 [internal quotation marks omitted]*). If determined that evidence was intentionally or willfully destroyed, the relevancy of the destroyed evidence is presumed. If determined that evidence was negligently destroyed, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense (*see id.* at 547-548).

Plaintiff did not impose a litigation hold until July 2010. However, the record does not support the court's conclusion that plaintiff was obligated to preserve documents relevant to the transaction between the parties as early as October 2007. The evidence does not show that plaintiff "reasonably anticipated" litigating against defendants at that time, but shows rather that a credible probability of litigation against defendants arose only significantly later (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 [1st Dept 2012]). Nor does the record support either the finding that plaintiff selectively preserved certain beneficial documents and recordings related to

the transaction for purposes of supporting its legal claims against defendants or the finding that plaintiff refused to produce key witnesses or prevented defendants from deposing them.

Since plaintiff had no duty to preserve evidence in 2007 and reasonably implemented a litigation hold in 2010 upon notice (*see* The Sedona Conference, *Commentary on Legal Holds, Second Ed.: The Trigger & The Process*, 20 Sedona Conf J 341 [2019]; *VOOM HD* at 43), there is no issue regarding the destruction of records neither intentionally, willfully nor negligently. Accordingly, a spoliation sanction is not triggered and a culpable state of mind analysis is not reached.

The court correctly denied defendants' motion for summary judgment based on its findings that issues of fact remain as to plaintiff's actual reliance on the alleged misrepresentations and whether defendants' alleged fraudulent conduct was the proximate cause of plaintiff's alleged losses. In addition, the court correctly found that issues of fact exist as to when plaintiff discovered the alleged fraud. Because defendants thus failed to establish as a matter of law that plaintiff ratified the

agreement after becoming aware of the fraud, the court correctly declined to dismiss the claim for rescission of the transaction agreement and to reject plaintiff's demand for a jury trial on the fraud claim based on the agreement term waiving that right.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Richter, J.P., Gische, Gesmer, Kern, González, JJ.

10762N U.S. Bank National Association, etc., Index 32811/16E
Plaintiff-Respondent,

-against-

Juerio Garcia also known as Jeuris Garcia, etc.,
Defendant-Appellant,

New York City Housing Authority, et al.,
Defendants.

_____

The Law Offices of Ari Mor, P.C., New York (Ari Mor of counsel), for appellant.

Reed Smith LLP, New York (Andrew B. Messite of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about June 29, 2018, which, to the extent appealed from as limited by the briefs, denied defendant Garcia's cross motion for summary judgment dismissing the foreclosure action as against him, unanimously affirmed, without costs.

In seeking dismissal, defendant made a prima facie showing that a prior foreclosure action, commenced by nonparty Coastal Capital Corp. (Coastal) in 2006, accelerated the entire loan as of that date. The acceleration was a term of the pleading (*U.S. Bank N.A. v Gordon*, 158 AD3d 832, 835 [2d Dept 2018]). Since the six-year limitations period applicable to a mortgage foreclosure action would have begun to run against the entire outstanding principal at that time, Garcia claims this action is time-barred, because it was commenced in 2017, well after the statute of

limitations expired (CPLR 213[4]).

In opposition, however, plaintiff has raised a disputed material issue of fact regarding whether Coastal had the authority to accelerated the mortgage and, consequently, whether this action is time-barred (*U.S. Bank N.A. v Charles*, 173 AD3d 564, 565 [1st Dept 2019]). This issue must be decided at a trial.[1]

We also reject defendant's claim that plaintiff did not comply with the requirements of RPAPL 1304. The Harrell affidavit, which is based upon her personal knowledge of and familiarity with the relevant mailing practices and procedures, demonstrated that the 90-day notice was sent to defendant pursuant to those practices, and copies of the notice and documentary proof of mailing were attached. Moreover, as the motion court noted, defendant does not deny that he received the notice.

Nor did defendant demonstrate that plaintiff lacks standing to bring this suit. Plaintiff established its standing by attaching the note, endorsed in blank by Coastal, to the complaint in this action (*see Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *HSBC Bank USA v Ezugwu*, 155 AD3d 546, 547 [1st Dept 2017]). In addition, plaintiff's trial counsel

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[1]Plaintiff also moved for summary judgment in its favor, which the trial court denied finding issues of fact on the issue of the statute of limitations. Plaintiff has not appealed.

affirmed, pursuant to CPLR 2106, that he had maintained physical possession of the note on plaintiff's behalf since before the action was commenced (*see PNC Bank, N.A. v Salcedo*, 161 AD3d 571, 572 [1st Dept 2018]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Friedman, J.P., Richter, Kapnick, Mazzarelli, Gesmer, JJ.

6049 In re Yvonne Porter, et al., Index No. 100546/16
Petitioners,

-against-

New York City Housing Authority,
Respondent.

_____

Yvonne Porter, petitioner pro se.

David I. Farber, New York City Housing Authority, New York, (Seth E. Kramer of counsel), for respondent.

_____

Petition, brought pursuant to CPLR article 78 (transferred to the Court by order of Supreme Court, New York County [Andrea Masley, J.], entered January 13, 2017), seeking to annul the determination of respondent, dated December 14, 2015, which, to the extent challenged, after a hearing, denied petitioner Yvonne Porter's grievance seeking succession rights as a remaining family member to the tenancy of her late mother, unanimously dismissed, without costs, as academic.

We initially held this matter in abeyance because the Hearing Officer failed to address Porter's argument that she was entitled to remaining family member status on the basis that she

resided with her mother with respondent's consent or approval (169 AD3d 455, 463 [1st Dept 2019], *lv dismissed* 34 NY3d 1010 [2019]). The matter was remanded and Porter's grievance was ultimately sustained. Accordingly, the proceeding is dismissed as academic.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9946 Sean Rad, et al., Index 654038/18
Plaintiffs-Respondents,

-against-

IAC/InterActiveCorp, et al.,
Defendants-Appellants.

- - - - -

The Real Estate Board of New York,
Amicus Curiae.

_____

Wachtell, Lipton, Rosen & Katz, New York (Marc Wolinsky of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Orin Snyder of counsel), for respondents.

Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Janice Mac Avoy of counsel), for amicus curiae.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 13, 2019, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the cause of action for breach of contract except for the merger-related claims asserted by plaintiffs Alexa Mateen and Justin Mateen, and the causes of action for tortious interference with contractual relations and tortious interference with prospective economic advantage, unanimously affirmed, without costs.

The court properly found that CPLR 7601 does not apply to bar plaintiffs' claims. CPLR 7601 permits, but does not require, the commencement of a special proceeding to enforce a valuation agreement. Although plaintiffs' claims undoubtedly relate to a dispute over the valuation process, plaintiffs are not seeking to

enforce the valuation agreement and are properly seeking relief in a plenary action (*see Matter of Penn Cent. Corp. [Consolidated Rail Corp.]*, 56 NY2d 120, 130 [1982]). In light of the foregoing, the parties' other arguments about the application of CPLR 7601 are moot.

The motion court properly found that issues of fact exist as to whether plaintiffs acquiesced to the transaction at issue. Although plaintiff Rad's unvested options vested immediately upon the merger, and he exercised them all, the equitable defense of acquiescence is "fact intensive, often depending . . . on an evaluation of the knowledge, intention and motivation of the acquiescing party" (*Julin v Julin*, 787 A2d 82, 84 [Del 2001]).

Contrary to defendants' contention, those plaintiffs whose employment terminated prior to the merger have standing to assert merger-related claims. While they were obligated to sell their

outstanding options upon leaving the company, those options were not valued until the merger.

The Decision and Order of this Court entered herein on October 29, 2019 (176 AD3d 635 [1st Dept 2019]) is hereby recalled and vacated (*see* M-8412 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick
Lizbeth González, JJ.

10600
Index 653486/16

_____x

Highland Crusader Offshore Partners, L.P., et al.,
Plaintiffs-Respondents-Appellants,

-against-

Targeted Delivery Technologies Holdings, Ltd., et al.,
Defendants-Appellants,

Xenova Group, Ltd., et al.,
Defendants,

Celtic Pharma Development Services Bermuda, Ltd.,
Defendant-Respondent.

_____x

Appeals and cross appeal from the order, Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2018, which, insofar as appealed from as limited by the briefs, granted defendant Celtic Pharma Development Services Bermuda Ltd.'s motion to dismiss the complaint as against it for lack of personal jurisdiction, denied the motions of defendants Targeted Delivery Technologies Holdings, Ltd. (TDTH), Celtic Pharma FIX,

Ltd., Celtic Pharma FIX Venture, Ltd., Celtic Pharma Management Company, Ltd., Celtic Therapeutics Management LLLP doing business as Auven Therapeutics Management LLLP and as successor in interest to Celtic Pharma Management, L.P. (Auven), and John Mayo to dismiss the complaint as against them for lack of personal jurisdiction, and denied the motions of TDTH, Celtic Pharma Management Company Ltd., and Auven to dismiss claims arising out of the servicing agreement for lack of standing.

Wiggin and Dana LLP, New Haven, CT (Jonathan M. Freiman of the Bar of the State of Connecticut and State of Pennsylvania, admitted pro hac vice of counsel) and Wiggin and Dana LLP, New York (Steven B. Malech and Michael L. Kenny, Jr.) for Targeted Delivery Technologies Holdings, Ltd., Targeted Delivery Technologies, Ltd., Celtic Pharma Management Company, Ltd., Celtic Pharma Fix, Ltd., Celtic Pharma Fix Venture, Ltd. and John Mayo, appellants and Celtic Pharma Development Services Bermuda, Ltd., respondent.

Milbank LLP, New York (Scott A. Edelman, Alison Bonelli and Will B. Denker of counsel), for Auven Therapeutics Management LLLP, appellant.

Stinson LLP, New York (Kieran M. Corcoran of counsel), for Highland Crusader Offshore Partners, L.P., respondent-appellant.

Reid Collins & Tsai LLP, Austin, TX (Craig A. Boneau of the bar of the State of Texas, admitted pro hac vice of counsel) and Reid Collins & Tsai LLP, New York (William T. Reid, IV and Ryan M. Goldstein of counsel), for Highland Credit Opportunities CDO, Ltd., Highland Credit Strategies Master Fund, L.P., Highlander Restoration Capital Partners Master, L.P., and NexPoint Credit Strategies Fund, respondents-appellants.

MANZANET-DANIELS, J.

On this appeal, we are asked to consider, among other issues, whether jurisdiction may be exercised over defendants by virtue of their close relationship with signatories to the contracts that contain forum selection clauses, notwithstanding that defendants lack minimum contacts with the forum. We find that plaintiffs have sufficiently pleaded allegations of a close relationship between the signatory and non-signatory parties so as to warrant jurisdictional discovery (*see Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 178-179 [1st Dept 2017].

Background

Plaintiffs are the majority holders of $156 million in secured notes issued by nonparty Celtic Pharma Phinco, B.V. that were due on June 15, 2012. The issuer was a wholly-owned subsidiary of Celtic Pharmaceuticals Holdings, L.P., a private equity fund (Fund).

The notes were guaranteed by various subsidiaries of Fund and the issuer, including, insofar as alleged here, Celtic Pharma FIX Ltd. and Celtic Pharma FIX Venture Ltd. (together, the FIX entities), Targeted Delivery Technologies Holdings (TDTH), and Targeted Delivery Technologies (TDT).

Celtic Pharma Management, L.P. (CPM) was the private equity

fund appointed to service the notes. Celtic Pharma Management Company, Ltd. (Manager) was CPM's general partner. (Defendant CPM has not appealed from the order denying its motion to dismiss. CPM "is now dissolved," according to defendant Stephen Evans-Freke.)

Auven is the alleged successor in interest to CPM; Celtic Pharma Management Development Services Bermuda Ltd. (Vendor) is an alleged guarantor of the notes; and Evans-Freke and John Mayo[1] are alleged to have been personally involved in and to have controlled the structuring of the notes offering.

Plaintiffs allege that defendants orchestrated an "international shell game," known as a "bleed-out," in order to defraud plaintiff noteholders. Plaintiffs allege that the scheme involved self-dealing transactions, parallel businesses, and intercompany transfers that had as their goal the depletion of the assets of the companies within the collateral pool that secured the notes, and the funneling of those assets to related companies outside the collateral pool, so that plaintiffs would be left "holding the bag" with claims for repayment against insolvent shell companies around the globe. Plaintiffs allege that defendants "engineere[ed] a vertically-integrated fraud

[1]Defendant Stephen Evans-Freke withdrew his appeal before oral argument.

designed to plunder the proceeds from the Notes for their own personal enrichment." Plaintiffs allege, inter alia, that the servicer (CPM) directed a substantial portion of the proceeds from the notes to Vendor for "development services" and to Manager in the form of inflated management fees that, based on information and belief, were calculated using knowingly inflated valuations of the product portfolio.

Plaintiffs allege that Fund and individual defendants Mayo and Evans-Freke created a "web of overlapping Celtic entities." Plaintiffs note that in addition to serving as managing general partners of Fund, Mayo and Evans-Freke serve or served as two of the issuer's three directors, as managing general partners of the servicer, as managing general partners of Manager, and as directors of Vendor and guarantors. Plaintiffs allege that the individual defendants' "domination" of the issuer was "so all-encompassing" that they simultaneously signed the transaction documents on behalf of the entities on both sides of the transaction. Plaintiffs allege that Fund, Evans-Freke and Mayo were "intimately involved" in the marketing of the notes and "emphasized" their expertise over that of the issuer. Plaintiffs maintain that Fund "unilaterally controlled" the development of the products in the security pool from which plaintiffs were to be repaid. Plaintiffs maintain that the servicer (CPM) was the

only entity within the Celtic group that had any employees or actual operations and that the rest of the companies were shell corporations or corporate general partners set up to hold assets and obtain beneficial tax treatment. Plaintiffs quote from the sworn statement of the former general counsel of CPM to the effect that the various companies were operated as "a single enterprise," with Mayo and Evans-Freke "responsible for all operational and management decisions." Plaintiffs allege that Evans-Freke and Mayo "puppeteered" the issuer and its subsidiaries "as if they were all part of a single, consolidated operation."

The Agreements

The notes indenture, dated as of January 31, 2007, contains a forum selection clause providing that

> "each of the parties hereto agrees that the U.S. federal and State of New York courts located in the Borough of Manhattan, The City of New York[,] shall have jurisdiction to hear and determine any suit, action or proceeding, and to settle any disputes, which may arise out of or in connection with this Indenture and, for such purposes, submits to the jurisdiction of such courts."

Mayo executed the indenture on behalf of the issuer and the "Guarantor[s]." The indenture defines "Guarantors" as "the Issuer Subsidiaries, the Product Subsidiaries, and TDT." The "Product Subsidiaries" are defined as "the Issuer Product

Subsidiaries, the TDT Product Subsidiaries and any Additional Product Subsidiary." The latter is defined as "any 75% Owned Subsidiary of Celtic [defined as Fund therein] that acquires any rights or interests (directly or indirectly) in an Additional Product after the Closing Date." A "75% Owned Subsidiary" is defined to include any entity of which at least 75% is directly or indirectly owned or controlled by a person, by such person and one or more of such person's subsidiaries, or by one or more subsidiaries of such person. An "Additional Product" is "any drug development project acquired, directly or indirectly, by Celtic or any Subsidiary thereof following the Closing Date that is financed by Additional Product Funds or funds from the Issuer Closing Account." "Additional Product Funds" are the funds that noteholders paid to purchase the notes.

On the same date the indenture was executed, the issuer, guarantors, and CPM executed a servicing agreement. The preamble to the servicing agreement states that the parties entered into the servicing agreement for CPM to "perform[] certain services with respect to the Indenture, the Notes and the Guarantees." The servicing agreement obligates CPM to maintain the issuer's bank accounts, prepare distribution reports for the noteholders, and deliver quarterly reports and financial statements to the noteholders.

The servicing agreement is governed by New York law and similarly contains a New York forum selection clause. Evans-Freke executed the servicing agreement on behalf of CPM, the issuer, and various guarantors.

The Litigation

The issuer is alleged to have defaulted on its obligations to plaintiffs on June 15, 2012. Plaintiffs commenced this action in 2016, and in 2018 they filed a first amended complaint alleging, inter alia, causes of action for fraudulent conveyance and breach of the indenture and servicing agreements. Insofar as relevant here, plaintiffs allege that the court has jurisdiction over Manager, TDTH, and the individual defendants because they are "closely related" to the signatories of the relevant agreements, and over Vendor, TDTH and the FIX entities as "Additional Product Subsidiary Guarantors."

Various defendants moved to dismiss the complaint pursuant to CPLR 3211. The court held that the individual defendants, TDTH, Fund,[2] and the Manager were bound by the forum selection clauses in the relevant agreements and subject to jurisdiction in New York based on the "closely related" doctrine.

The motion court found that plaintiffs had adequately

[2]Fund has not appealed from the order denying its motion.

alleged that the FIX entities qualified as "Additional Product Subsidiaries" and were therefore bound by the forum selection clauses.

The motion court found as to Auven that plaintiffs had adequately pleaded successor liability (to CPM) as a basis for jurisdiction, stating that "whether successor liability can successfully be established should be determined after discovery."

The motion court granted Vendor's motion to dismiss on the ground that it was not a direct or indirect subsidiary of a contracting party.

Seven defendants perfected their appeals: Manager, TDTH, the FIX entities, Auven, and Mayo and Evans-Freke who, as previously indicated, has since withdrawn his appeal. Plaintiffs cross-appeal to the extent the court granted Vendor's motion to dismiss for lack of personal jurisdiction.

Analysis

Forum Selection Clause

Defendants maintain that the assertion of jurisdiction over them based on the "closely related" doctrine was improper, as they lack minimum contacts with the forum. Plaintiffs maintain that minimum-contacts analysis is inapposite where jurisdiction is predicated on consent to a forum selection clause under a

"closely related" analysis. A "closely related" analysis requires that the relation of the parties be such as to make application of the clause foreseeable, rendering a separate minimum-contacts analysis unnecessary.

It is a general principle that only the parties to a contract are bound by its terms (*see Tate & Lyle Ingredients Ams., Inc. v Whitefox Tech, USA, Inc.*, 98 AD3d 401 [1st Dept 2012]). A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary or an alter ego of a signatory or where it is a party to another related agreement that forms part of the same transaction (*id.*).

A non-signatory may also be bound by a forum selection clause where the non-signatory and a party to the agreement have such a "close relationship" that it is foreseeable that the forum selection clause will be enforced against the non-signatory (*see generally Freeford Ltd. v Pendleton*, 53 AD3d 32, 39 [1st Dept 2008], *lv denied* 12 NY3d 702 [2009]). The rationale for binding non-signatories is based on the notion that forum selection clauses "promote stable and dependable trade relations," and thus, that it would be contrary to public policy to allow non-signatory entities through which a party acts to evade the forum selection clause (*Tate & Lyle*, 98 AD3d at 402).

In *Tate & Lyle*, we applied the "closely related" doctrine

where a plaintiff signatory was seeking to enforce a forum selection clause as against a defendant non-signatory. In determining whether a non-signatory is "closely related" to a signatory, we reasoned that the inquiry should focus on whether "the nonparty's enforcement of the forum selection clause is foreseeable by virtue of the relationship between the nonparty and the party sought to be bound" (98 AD3d at 402 [internal quotation marks omitted]). We found that the record demonstrated that the counterclaim defendant, the plaintiff's parent company, was closely related to its wholly-owned subsidiary and a signatory to a licensing agreement and therefore that it was "reasonably foreseeable" that it would be bound by a forum selection clause (*id.* at 402-403). The CEO of the parent company testified that it was he who made the decision not to return the defendant's technology when the defendant had demanded its return and his decision to continue to use the technology at the subsidiary's plant. It was clear that the entities not only consulted with each other, but also were both involved in the decision-making process from the inception of the agreement through the commencement of the litigation. Thus, the parent could not seriously maintain that it was not reasonably foreseeable that the forum selection clause would be asserted against it.

In *Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.* (154 AD3d 171, 178-179 [1st Dept 2017], we found that jurisdiction could be asserted against a non-signatory defendant based on the "closely related" doctrine, reversing and remanding for further discovery. The plaintiffs in *Bakrie* alleged that the individual defendants, by virtue of their senior management positions and decision-making authority, and the defendant's parent company, as principal shareholder, had actual knowledge that the subsidiary was insolvent and incapable of meeting its obligations under the notes, yet participated in and promoted the offering. We found this enough, at a preliminary stage, to permit jurisdictional discovery as to the individual defendants' actual knowledge and role in the offering (*id.* at 179-180; *see also Borden LP v TPG Sixth St. Partners*, 173 AD3d 442 [1st Dept 2019]).

It is true, as defendants assert, that the motion court did not undertake a separate minimum-contacts analysis. However, the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is foreseeable that the non-signatory will be bound by the forum selection clause.[3]

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[3]While the published decision in *Bakrie* does not discuss due process, the *Bakrie* defendants made that argument (brief

Thus, courts have recognized that a consent to jurisdiction by virtue of the "close relationship" between the non-signatory and contracting party obviating the need for a separate analysis of constitutional propriety (*see Recurrent Capital Bridge Fund I, LLC v ISR Sys. & Sensors Corp.*, 875 F Supp 2d 297, 306 [SD NY 2012]; *Power Up Lending Group Ltd. v Nugene Intl., Inc.*, 2019 WL 989750, *3 n 3 [ED NY, Mar. 1 2019] ["Since plaintiff has met its burden of making a prima facie showing that [defendant nonsignatory] is closely related enough to the contractual relationships at issue based upon his 'vertical relationship' with Nugene, such that he is bound by the forum selection clause in the subject Agreements, the exercise of personal jurisdiction over him in this case is consistent with federal due process requirements"] [citation omitted]).

Arcadia Biosciences, Inc. v Vilmorin & Cie (356 F Supp 3d 379 [SD NY 2019]), upon which defendants heavily rely, is distinguishable. The plaintiff in *Arcadia Biosciences* was attempting to hold a non-signatory future affiliate of the defendant to a forum selection clause. It was not reasonably foreseeable that the future affiliate – formed eight years after

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available at 2016 WL 11539017, *47-49). By denying the *Bakrie* defendants' motion to dismiss, we sub silentio rejected their due process arguments.

the contract had been executed – would be bound by the forum selection clause.

Plaintiffs adequately allege that Mayo, TDTH, and Manager are closely related to signatories such that enforcement of the forum selection clause against them was foreseeable (*see e.g. Firefly Equities LLC v Ultimate Combustion Co.*, 736 F Supp 2d 797, 800 [SD NY 2010]; *Bakrie*, 154 AD3d at 179). Mayo served as co-managing general partner of Fund (with Evans-Freke) and as one of the issuers' three directors. Mayo and Evans-Freke executed the relevant agreements on behalf of whichever Celtic entity was party to that agreement. Mayo, for example, executed the indenture on behalf of the issuer and 16 named guarantors, as well as an undertaking on behalf of the issuer and Fund. Evans-Freke executed the servicing agreement on behalf of the issuer, the servicer, 16 named guarantors, and Manager. Among other things, the prospectus for the notes advised that the issuer was "highly dependent upon our senior management, particularly Stephen Evans-Freke and John Mayo, [] Celtic's two Managing General Partners," warning that "[i]f we fail to . . . keep senior management, we may be unable to successfully develop the Products, conduct our clinical trials, identify Additional Products and, ultimately, sell our rights and interests in the Products" (*see e.g. Firefly Equities LLC*, 736 F Supp 2d at 800

[foreseeable that forum selection clause would be enforced against corporate president in his individual capacity where he signed the contract in his representative capacity]).

TDT, which executed the indenture, is a subsidiary of TDTH. The indenture references TDTH throughout, and incorporates as a "Transaction document[]" a subscription agreement between the issuer and TDTH. Thus, enforcement of the forum selection clause against TDTH was foreseeable by virtue of TDTH's ownership interest in and control over TDT and its involvement in the notes offering.

Manager is CPM's general partner and executed the servicing agreement on its behalf (via Evans-Freke as managing general partner). The servicing agreement obligated CPM to "perform[] certain services with respect to the Indenture, the Notes and the Guarantees." Enforcement of the forum selection clause against Manager was foreseeable by virtue of Manager's role as CPM's general partner and CPM's significant role in the transaction. Manager is amenable to personal jurisdiction in any event as the general partner of CPM, which is subject to the clause (*see U.S. Bank Natl. Assn. v Ables & Hall Bldrs.*, 582 F Supp 2d 605, 615-616 [SD NY 2008]).

Plaintiffs' allegations are thus enough, at this preliminary stage, to permit jurisdictional discovery as to the various

defendants' knowledge of and role in the offering (*see Bakrie*, 154 AD3d at 179-180).

"Additional Product Subsidiaries"

"Absent explicit language demonstrating the parties' intent to bind future affiliates of the contracting parties, the term 'affiliate' includes only those affiliates in existence at the time that the contract was executed" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 246 [2014]). Where, however, the parties "intend[] to bind future affiliates, they [may] include[] language expressing that intent" (*id.*; *see also Georgia Malone & Co. v E&M Assoc.*, 163 AD3d 176, 186 [1st Dept 2018] ["The language following the signatures also indicates an intent to bind all future entities related to E&M, its employees and officers, as well as successors"]).

Here, the express terms of the indenture make clear that the parties intended future Celtic entities to qualify as "Guarantors" by virtue of benefitting from the proceeds of the offering. An "Additional Product Subsidiary" is defined as "any 75% Owned Subsidiary of Celtic [defined as Fund therein] that acquires any rights or interests (directly or indirectly) in an Additional Product *after the Closing Date*" (emphasis added). Similarly, "Additional Product" is defined as "any drug development project acquired, directly or indirectly, by Celtic

or any Subsidiary thereof *following the Closing Date* that is financed by Additional Product Funds or funds from the Issuer Closing Account" (emphasis added). Thus, the indenture explicitly contemplated that if noteholder funds were expended after the closing date by any entity 75% owned by Fund to develop products, that entity would qualify as an "Additional Product Subsidiary," i.e., a "Guarantor[]" under the indenture.

Plaintiffs specifically allege that TDTH and the FIX entities qualify as "Additional Product Subsidiar[ies]." TDTH is at least 75% owned by Fund and owns 100% of TDT, which plaintiffs allege has developed "Additional Products" using "funds that the Notes generated to develop new products," i.e., "Additional Product Funds."[4] The FIX entities are wholly-owned subsidiaries of the issuer, which is owned by Fund, and are alleged to have used proceeds from the notes to acquire interests in Additional Products from a company called Inspiration Biochemicals.

Plaintiffs have also adequately alleged, at this stage, that the Vendor is an "Additional Product Subsidiary." The motion court found that Vendor did not qualify as an "Additional Product Subsidiary" because it was not a subsidiary of the issuer.

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[4]Because the motion court found that TDTH was closely related to TDT, it did not reach the question of whether TDTH qualified as an "Additional Product Subsidiary."

However, the indenture uses the term "Celtic" to refer to Fund, i.e., Celtic Pharmaceutical Holdings, L.P., which sits above the issuer on the organizational chart. Plaintiffs allege that Vendor is more than 75% owned by Fund, and that it acquired rights in "Additional Product[s]" after the issuance of the notes.

Liability of Auven as Successor to CPM

If successorship is established, a forum selection clause will bind a contracting party's successor in interest (*see Aguas Lenders Recovery Group LLC v Suez, S.A.*, 585 F3d 696, 701 [2d Cir 2009]). New York recognizes four exceptions to the general rule that an acquiring corporation is not liable for the liabilities of the acquired corporation: (1) a buyer who formally assumes the seller's debts; (2) a buyer who de facto merged with the seller; (3) transactions undertaken to defraud creditors; and (4) where the buyer may be considered a "mere continuation" of the seller (*id.* at 702).

The hallmarks of a de facto merger include a continuity of ownership; cessation of ordinary business and dissolution of the acquired corporation as soon as possible; assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and continuity of management, personnel, physical

location, assets and general business operation (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]). A court will "look to whether the acquiring corporation was seeking to obtain for itself intangible assets such as good will, trademarks, patents, customer lists and the right to use the acquired corporation's name" (*id.* at 575). The doctrine is based on the principle that a successor who "effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (*id.* [internal quotation marks omitted]).

Plaintiffs have adequately alleged, at this preliminary stage, that Auven was the successor to CPM, the servicer (*see Fitzgerald*, 286 AD2d at 574). Plaintiffs allege that a key element of the "bleed-out" scheme was the creation of successor funds and the transfer of assets and rights otherwise within the collateral pool to those funds. Plaintiffs note that whereas Fund, the issuer, and CPM are now insolvent and/or no longer operating, Evans-Freke continues to operate Auven as a profitable private equity firm focused, like its predecessor, on investing in novel drug development programs.

Plaintiffs cite the following in support of their theory that Auven is carrying on the business of CPM: Evans-Freke co-founded both CPM and Auven. He serves as one of two general

partners of Auven and the managing general partner of Manager, which is the general partner of CPM. According to nonparty Averill Powell, the former general counsel to the Celtic Pharma and Celtic Therapeutics groups, Auven's predecessor agreed to "assume costs and liabilities related to the operation of CPM's New York office as of September 2009, including the costs and liabilities associated with salaries and bonuses for [Powers] and other junior carried interest limited partners." They shared overlapping investors, board members, and employees, including key management such as the general counsel, chief accounting officer, and head of clinical development. Plaintiffs allege that upon its formation, Auven did not set up separate payroll for employees who also worked for CPM. Plaintiffs note that Auven registered trademarks for "Celtic," "Celtic Pharma Group," "The Celtic Group," and "Celtic Pharma International," only "rebranding" following the issuer's default on the notes.

Auven argues that it is shielded from liability because Evans-Freke co-founded CPM and Auven with two different co-founders and thus ownership of the entities is not "identical." Continuity of ownership, however, does not mean identity of ownership (*see Matter of Abreu v Barkin & Assoc. Real Estate, LLC*, 136 AD3d 600, 602 [1st Dept 2016] [sole shareholder in predecessor owned 51% of successor]; *Ladenburg Thalmann & Co. v*

Tim's Amusements, 275 AD2d 243, 248 [1st Dept 2000] [shareholder owned 20% of predecessor and 72% of successor]).

Auven maintains that it adopted bifurcation protocols to keep its operations distinct from those of the other Celtic Pharma entities, citing Evan-Freke's affidavit. Auven raises factual issues not capable of resolution at this preliminary stage. As the motion court found, "whether successor liability can successfully be established should be determined after discovery."

Standing under the Servicing Agreement

Plaintiffs are intended third-party beneficiaries of the indenture. Thus, they have standing to enforce the servicing agreement, which is part of the same transaction (*see Tate & Lyle*, 98 AD3d 401). The two contracts were executed on the same day, and the indenture incorporates the servicing agreement as one of the "Transaction Document[s]" that governs the notes. Indeed, the purpose of the servicing agreement was to implement and service the indenture. The preamble to the servicing agreement makes clear that CPM, the issuer, and the guarantors entered into the servicing agreement in order for CPM to "perform[] certain services *with respect to the Indenture, the Notes*, and the Guarantees" (emphasis added).

We have considered and rejected the other arguments for

affirmative relief.

Accordingly, the order, Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2018, which, insofar as appealed from as limited by the briefs, granted defendant Celtic Pharma Development Services Bermuda Ltd.'s motion to dismiss the complaint as against it for lack of personal jurisdiction, denied the motions of defendants Targeted Delivery Technologies Holdings, Ltd. (TDTH), Celtic Pharma FIX, Ltd., Celtic Pharma FIX Venture, Ltd., Celtic Pharma Management Company, Ltd., Celtic Therapeutics Management LLLP doing business as Auven Therapeutics Management LLLP and as successor in interest to Celtic Pharma Management, L.P. (Auven), and John Mayo to dismiss the complaint as against them for lack of personal jurisdiction, and denied the motions of TDTH, Celtic Pharma Management Company Ltd., and Auven to dismiss claims arising out of the servicing agreement for lack of standing, should be

modified, on the law, to deny Celtic Pharma Development Services Bermuda Ltd.'s motion, and otherwise affirmed, without costs.

All concur.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 4, 2018, modified, on the law, to deny Celtic Pharma Development Services Bermuda Ltd.'s motion, and otherwise affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Acosta, P.J., Renwick, Manzanet-Daniels, Kapnick, González, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 21, 2020

CLERK